Filed 6/22/04 P. v. Miranda CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JESUS MARIO MIRANDA, Defendant and Appellant.	2d Crim. No. B162992 (Super. Ct. No. CR48899A) (Ventura County)

Jesus Miranda appeals from the judgment entered after a jury verdict convicting him of the second degree murder of Edgar Cruz (Pen. Code, §§ 187, subd. (a). 189),[1] the attempted murder of Andres Morales (§§ 664, 187, subd. (a)), shooting at an inhabited dwelling (§ 246), carrying a loaded firearm while being an active participant in a criminal street gang (§ 12031, subd. (a)(2)(C)), and assault with a firearm. (§ 245, subd. (a)(2).) Except for the offense of carrying a loaded firearm, the jury found true allegations that all of the offenses had been committed for the benefit of a criminal street gang. (§ 186.22(b)(1).) As to the offenses of murder, attempted murder, and shooting at an inhabited dwelling, the jury found true allegations that appellant had personally and intentionally discharged a firearm and had proximately caused great

[1] All statutory references are to the Penal Code unless otherwise stated.

bodily injury or death to the victims. (§ 12022.53, subd. (d).) As to the offense of assault with a firearm, the jury found true allegations that appellant had personally used a firearm and had personally inflicted great bodily injury upon Andres Morales. (§§ 12022.5, subd. (a)(1) (now subd. (a)), 12022.7, subd. (a).) The charges were set forth in an indictment returned by the Grand Jury of Ventura County.

On the murder conviction, appellant was sentenced to prison for 15 years to life. On the attempted murder conviction, he was sentenced to prison for nine years. The sentence on each conviction was increased by 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)) plus 25 years to life for the section 12022.53, subdivision (d), firearm enhancement. The sentences were ordered to run consecutively. Thus, the total determinate term for these convictions and enhancements was 29 years. The total indeterminate term was 65 years to life.

The trial court imposed sentences on the remaining convictions and enhancements, but it ordered that the execution of these sentences be stayed pursuant to section 654.

Appellant contends that the trial court erred in: (1) admitting the conditional examination of an eyewitness (Carlos Mendez) to the shooting of Andres Morales; (2) admitting evidence of a prior murder committed by gang members; (3) instructing the jury; (4) denying his post-conviction motion for discovery; and (5) imposing sentence.

We conclude that appellant's first contention has merit. However, the erroneous admission of Mendez's conditional examination was harmless beyond a reasonable doubt. We reject appellant's remaining contentions, except that we conclude that the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) on the second degree murder conviction must be stricken. We modify the judgment to reflect this change in appellant's sentence and affirm the judgment as modified.

Facts[2]

Mara Salvatrucha, also known as "MS," is a "Salvadorean-based" street gang. Appellant was a member of MS. He had "MS" tattooed on various parts of his body, including his forehead and the back of his head. His head was shaved. He also had an MS gang tattoo on his neck.

Rafael Abarca was a member of MS. On April 16, 2000, Abarca attacked Edgar Cruz with a machete. Cruz was not a gang member.

Marco Arresis was a member of MS and claimed to be Cruz's friend. In the evening on April 28, 2000, Arresis saw appellant and another person hitting and kicking Cruz. The fight occurred in an alley behind apartments on Avenida del Platino in Las Casitas. Appellant said to Cruz: " 'You wanna die? If you don't want to die, get the fuck out of here[.]' " Cruz ran away.

Later that same evening, Arresis saw a red Toyota Celica and a white Mustang park on Avenida del Platino. Cruz walked down the street toward a group of persons who had gathered around the vehicles. A fight broke out between Cruz and the other persons. Arresis heard gunshots and saw appellant with a gun in his hand. Appellant held the gun out directly in front of his body. Cruz was seven to eight feet away from appellant and was facing him. Cruz screamed and fell to the ground. Someone said " 'This is MS. Respect.' "

Arresis was approximately one foot away from appellant when the shooting occurred. Arresis was able to easily identify appellant because "[h]e was the only one who had a tattoo on his head." The tattoo consisted of the letters "MS." Arresis did not see anyone else with a gun.

---

[2] The statement of facts excludes the conditional examination of Carlos Mendez. Mendez's conditional examination is summarized in the next part of this opinion.

Noel Saravia also witnessed the shooting of Cruz. He heard someone say " 'Take it out.' " He saw appellant holding a pistol about five feet away from Cruz. He noticed that appellant had no hair and had a tattoo on his forehead, the back of his head, and his neck. Appellant said: " 'This is the real shit.' " He fired the pistol, and Cruz fell to the ground. Cruz was bleeding and screaming. Appellant "started laughing" and called out " 'Mara Salvatrucha.' "

Saravia heard a total of four shots. Appellant was the only person that Saravia saw with a gun. Saravia testified that appellant "came out from the area more or less where the [white] car was parked."'

Like Arresis, Saravia also saw Cruz fighting in the alley before the shooting. But unlike Arresis, Saravia testified that appellant was not involved in the fight. Saravia told the sheriff that the person fighting Cruz had a shaved head and was wearing a white T-shirt. Saravia saw Arresis with this unidentified person, but Arresis was not fighting Cruz.

Andre Morales was shot at approximately the same time as Cruz. Morales was Cruz's friend and was not a gang member. Before the shooting, Morales saw appellant standing under a light by the side of the white Mustang in front of 631 Avenida del Platino. Morales saw a tattoo on appellant's head, but he was unable to read what the tattoo said.

Morales went inside the residence at 611 Avenida del Platino. His friend, Carlos Mendez, lived there. Morales met Mendez inside and was told that "somebody was hitting [Cruz] . . . ."

Morales went outside and saw people fighting in the street. Someone exited the white Mustang and jogged toward the location of the fight. The person looked at Morales, shouted at him, aimed a gun in his direction, and started shooting. Morales saw "the flash of the gun[.]" The shooter had a shaved head and was wearing a white

shirt and blue pants. Morales was unable to identify the shooter because it was too dark to see his face.

Morales ran back inside the house and noticed that he had been wounded. He heard two more shots. Someone told him that Cruz had been shot. Morales called 911.

Sonia Aguillon observed the shooting of Cruz. In her testimony before the grand jury, Aguillon described the shooter as "bald" and wearing a white shirt and "dark blue or black jeans." This description was consistent with what she had told a deputy sheriff immediately after the shooting. Aguillon said to the deputy: " 'He [the shooter] didn't have hair. I guess his hair was like buzzed or shaved.' " At trial Aguillon testified for the defense and described the shooter as having "really short, close to shaved" black hair.

After the shooting, Donaldo Cabrera saw a man with a pistol get inside the right passenger side of the red Toyota Celica. Cabrera could not remember whether the man was in the front or the back seat. The car drove away. Immediately after the shooting, Cabrera told a deputy sheriff that the man was wearing a white T-shirt and light-blue colored jeans and had a "bald, shaved" head. But at trial Cabrera testified that the man had "a little bit of hair."

On cross-examination by appellant, Cabrera testified that appellant was not the man with the pistol. However, on redirect examination, Cabrera testified that he did not know whether appellant was the man.

Shortly after the shooting, deputy sheriffs stopped the red Toyota Celica. The vehicle contained four occupants: Carlos Escobar (the driver), Adan Gonzales (right front passenger), Roberto Guerra (right rear passenger), and appellant (left rear driver's side passenger).

The occupants were arrested and taken to the sheriff's station, where they were photographed. The photographs show that appellant was wearing blue jeans and a

white T-shirt. His head was clean-shaven. The tattoos on his forehead, neck, and back of his head were clearly visible. The other occupants had close-cropped black hair and had no tattoos on their heads and necks. Carlos Escobar was wearing dark-colored pants and a blue-and-white checkered shirt. Adan Gonzales was wearing a white T-shirt and black pants. Roberto Guerra was wearing a white T-shirt and gray pants.

The deputies found a six-shot revolver in the engine compartment of the Toyota Celica. The revolver contained a single .357 Magnum live round. A ballistics expert opined that two of three bullet jackets found at the scene of the shooting had been ejected from the revolver. The "class characteristics" of the third bullet jacket were "consistent with those of the revolver," and it "could have been" expelled from that weapon.

Gunshot residue was found on both of appellant's hands. No gunshot residue was found on the hands of the other occupants of the Toyota Celica.

An expert in criminal street gangs opined that the shootings of Cruz and Morales benefited MS by bringing it respect and notoriety and by engendering "fear in the eyes of everyone else . . . ." The shootings also benefited appellant by enhancing his stature within the gang.

The defense theory was that Adan Gonzales, one of the four occupants of the Toyota Celica, was the shooter. Deputy Sheriff Jose Araujo initially reported that, at a field show-up after the shooting, Carlos Mendez had identified Gonzales as the shooter. Sergeant Cheryl Wade (now Captain Wade) questioned the accuracy of his report. Thereafter, Araujo realized that he had made a mistake and that Mendez had actually identified appellant, not Gonzales. Araujo wrote a supplemental report correcting the mistake.

The Trial Court Erred In Admitting The Conditional Examination Of Carlos Mendez; The Error, However, Was Harmless

If a material witness is about to leave the state, the trial court may order that the witness be examined conditionally. The conditional examination is admissible at trial "if the court finds that the witness is unavailable as a witness within the meaning of Section 240 of the Evidence Code." (§ 1345.)

The trial court ordered that Carlos Mendez be examined conditionally because he was about to leave the state and go to Mexico. Mendez was in Mexico during the trial, and his videotaped conditional examination was admitted in evidence over appellant's objection. Appellant contends that its admission violated his Sixth Amendment right of confrontation because respondent failed to exercise due diligence in attempting to obtain Mendez's attendance at the trial.

The conditional examination occurred on December 4, 2001. Mendez testified that he intended to go to Mexico and remain there "indefinitely." He admitted receiving a subpoena requiring him to appear in court on January 8, 2002, when the trial was scheduled to begin. He did not know whether he would be able to return to the United States for the trial because he had sick relatives in Mexico and because he would need a visa. Mendez admitted that he was in the United States illegally.

Respondent assured the trial court that "every effort will be made to get [Mendez] back" for the trial. Respondent stated: "Mr. Mendez, you understand that . . . the District Attorney's Office, can arrange for visas and for you to return into this country for your testimony on January 8th of 2002; correct?" Mendez replied: "Yes, I understand."

On February 6, 2002, 14 days after the beginning of trial testimony, respondent called Jess Velasquez, a district attorney investigator, to show that it had "exercised 'due diligence' in [its] attempts to subpoena and produce Carlos Mendez for trial." Velasquez testified as follows: Mendez did not appear in court on January 8, 2002.

After the trial started, Velasquez contacted Mendez's brother, who gave him a telephone number in Mexico for Mendez. Velasquez made numerous telephone calls to the number without success. Finally, on February 4, 2002, Velasquez was able to contact Mendez by telephone. Mendez said he was at home in Yucatan, Mexico. Mendez initially said he would not be willing to return to the United States to testify at the trial. But he later changed his mind and said he would be willing to return.

The morning after the telephone conversation, Velasquez telephoned the Immigration and Naturalization Service (INS) to inquire about bringing Mendez back to the United States. An unidentified person at INS told him "that things have changed" since September 11, 2001. Mendez "left a message for another person" at INS. That person had not yet contacted him. Velasquez had no opinion "as to how long it may take with the INS to get permission to bring [Mendez] into this country[.]" Although Velasquez knew in December that Mendez was planning to travel to Mexico, he had not "initiate[d] any sort of proceedings or paperwork with INS at that time . . . ."

After hearing Velasquez's testimony, the trial court declared that Mendez "isn't available for the purposes of the conditional examination." Respondent concedes that "[d]efense counsel objected, asserting that the prosecutor had not exercised due diligence to obtain [Mendez's] presence for the trial."[3]

Mendez's videotaped testimony was played for the jury. Mendez testified as follows: On April 28, 2000, Andres Morales came to Mendez's house at 611 Avenida Platino. Mendez and Morales went outside to smoke a cigarette. Mendez saw Cruz walk toward a group of people that were gathered around a red car. When Cruz

---

[3] In fact, defense counsel never mentioned "due diligence." But counsel did say that respondent should have "initiate[d] INS proceedings back in December to secure his presence here in January." In view of respondent's concession, we consider defense counsel's statement to constitute an objection on due diligence grounds.

reached the group, a fight ensued. Appellant exited the passenger side of a white car and ran towards the fight. Appellant aimed a gun at Mendez and Morales and fired several shots. Mendez ran inside his house. He heard about four additional gunshots. Morales came inside and said he had been shot. Mendez could hear Cruz screaming in pain outside. Mendez walked outside to where Cruz was lying in the street. The sheriff came and transported Mendez to a location where he identified appellant as the person who had fired shots at him and Morales.

The admissibility of Mendez's conditional examination us governed by *People v. Sandoval* (2001) 87 Cal.App.4th 1425. In *Sandoval* a material witness testified at the preliminary hearing. He was subsequently deported to Mexico. The witness was willing to return to the United States to testify at the trial if the prosecution would finance the trip and if he could obtain a passport and visa. The prosecution decided not to assist the witness. At trial, his preliminary hearing testimony was admitted under the former testimony exception to the hearsay rule. (Evid. Code, § 1291.) The exception requires that the hearsay declarant be "unavailable as a witness . . . ." (*Id*., subd. (a).)

The appellate court concluded that, because the witness was in Mexico, he was unavailable within the meaning of Evidence Code section 240, subdivision (a)(4), which provides that a witness is unavailable if he is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process." Therefore, the witness's preliminary hearing testimony was statutorily admissible under the former testimony exception to the hearsay rule. (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1434.)

But the *Sandoval* court decided that, in view of a mutual legal assistance treaty between the United States and Mexico that became effective in 1991, the admission of the former testimony violated the Sixth Amendment Confrontation Clause. The court noted that "the treaty specifically provides for mutual assistance in obtaining witnesses

for trial. [Citation.]" (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1440.) The violation of the Confrontation Clause arose because the prosecution had failed to make a reasonable, good faith effort to obtain the witness's attendance at the trial. (*Id*., at pp. 1443-1444.) The court cited the following passage from *Ohio v. Roberts* (1980) 448 U.S. 56, 74-75: "The basic litmus of Sixth Amendment unavailability is established: '[A] witness is not "unavailable" for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.' [Citations.] [¶] Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate."[4]

The *Sandoval* court recognized that it was changing state law. (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1433, fn. 1.) Prior to *Sandoval*, the law was that "a foreign citizen outside of the country can be considered per se unavailable without violating the Sixth Amendment." (*People v. Denson* (1986) 178 Cal.App.3d 788, 792; see also *People v. Ware* (1978) 78 Cal.App.3d 822, 833.)

---

[4] *Ohio v. Roberts* was disapproved on other grounds in *Crawford v. Washington* (2004) _ U.S. _ , 124 S.Ct. 1354, 1369-1370.

Thus, pursuant to *Sandoval,* respondent was required to make a good faith, reasonable effort to secure Mendez's presence at trial even though he was a Mexican citizen residing in Mexico. We reject respondent's contention that *Sandoval* is distinguishable because, unlike the witness in that case, Mendez was examined conditionally and his testimony was videotaped. The videotaped testimony was still hearsay evidence. Respondent, therefore, was required to establish Sixth Amendment unavailability: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Crawford v. Washington, supra,* ___U.S. at p. ___ [124 S.Ct. at p. 1369]; see also *Brumley v. Wingard* (6th Cir. 2001) 269 F.3d 629, 641-644 [admission of videotaped deposition testimony without showing of witness's unavailability violated Confrontation Clause]; *United States v. Allie* (5th Cir. 1992) 978 F.2d 1401, 1406-1408 [videotaped deposition testimony of witnesses living in Mexico inadmissible unless government has made good faith and reasonable efforts to obtain the witnesses' attendance at trial]; accord, *United States v. Santos-Pinon* (9th Cir. 1998) 146 F.3d 734, 736.)[5]

In the proceedings below, neither the trial court nor the parties mentioned *Sandoval*. Respondent relied on *People v. Thompson* (1998) 61 Cal.App.4th 1269. In *Thompson* the court held that the conditional examination of an out-of-state witness is admissible irrespective of whether the prosecution has exercised due diligence in attempting to obtain the witness's presence at the trial. The court concluded that such a

---

[5] In *Aguilar-Ayala v. Ruiz* (5th Cir. 1992) 973 F.2d 411, 419, the court noted that videotaped deposition testimony is not an adequate substitute for live testimony before a jury: "Only through live cross-examination can the jury fully appreciate the strength or weakness of the witness' testimony, by closely observing the witness' demeanor, expressions, and intonations. Videotaped deposition testimony, subject to all of the rigors of cross-examination, is as good a surrogate for live testimony as you will find, but it is still only a substitute. Even the advanced technology of our day cannot breathe life into a two-dimensional broadcast. [¶] Trial by deposition steps hard on the right of criminal defendants to confront their accusers."

witness is unavailable within the meaning of Evidence Code section 240. (*People v. Thompson, supra,* 61 Cal.App.4th at p. 1280.) But the *Thompson* court never considered the Sixth Amendment issue raised by appellant. It found that this issue had been waived: "Defendant also argues the conditional examination deprived him of his constitutional right of confrontation. The record reveals defendant failed to raise such an objection in the trial court, and the issue has been waived. [Citation.]" (*Id*., at pp. 1280-1281, fn. 11.) Respondent does not claim that the issue has been waived here.[6]

Accordingly, to satisfy the requirements of the Confrontation Clause, respondent bore the burden of showing that it had "made a reasonable, good faith effort to obtain the attendance of [Mendez] at trial." (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1428.) We independently review whether respondent carried its burden. (*People v. Cromer* (2001) 24 Cal.4th 889, 901; *People v. Sandoval, supra,* 87 Cal.App.4th at p. 1432.)

Respondent failed to carry its burden. At the time of the conditional examination on December 4, 2001, respondent knew that Mendez would be traveling to Mexico and would need a visa to return to the United States. Although respondent assured the trial court that "every effort will be made to get [Mendez] back" for the trial, no evidence was presented that respondent had tried to maintain contact with him before his failure to appear for trial on January 8, 2002. Nor was any evidence presented that, before February 5, 2002, respondent had made any effort to arrange for Mendez's return to the United States. On February 5, 2002, Velasquez merely

---

[6] Appellant contends that his trial counsel objected on the ground that admission of the conditional examination would violate his Sixth Amendment right of confrontation. Respondent does not dispute this contention. Appellant further contends that, if counsel had failed to object on this ground, he would have been denied his constitutional right to the effective assistance of counsel.

telephoned INS and was told "that things have changed" since September 11, 2001. No evidence was presented as to the feasibility of obtaining permission from the INS for Mendez's reentry prior to the conclusion of the trial. In view of this lack of evidence and Mendez's expressed willingness to return for the trial, we cannot say it would have been futile for respondent to have made a good faith effort to obtain permission from the INS for Mendez's reentry. The jury continued to hear testimony through February 20, 2002, so Velasquez had time after February 5 to seek Mendez's return.

Thus, the admission of Mendez's conditional examination violated appellant's constitutional right of confrontation. (*People v. Sandoval, supra,* 87 Cal.App.4th at pp. 1443-1444.) But the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Disregarding Mendez's testimony, the evidence against appellant was overwhelming. Arresis testified that, on the same evening as the shooting, appellant had fought with Cruz and had threatened to kill him. Two witnesses - Arresis and Saravia - unequivocally identified appellant as the person who had shot Cruz. They were close to appellant when the shooting occurred and had ample opportunity to accurately observe what was happening. Arresis was approximately one foot away from appellant. Appellant was easily identifiable because of his tattoos. Arresis and Saravia did not see anyone else with a gun.

Although Morales was unable to identify the person who had shot him, appellant matched the physical description that Morales gave of the shooter: he was wearing a white T-shirt and blue jeans and had a shaved head. Sonia Aguillon similarly described the shooter in statements to the sheriff immediately after the shooting and in testimony before the grand jury. Aguillon told the grand jury that the shooter was "bald" and was wearing a white shirt and "dark blue or black jeans."

Furthermore, both appellant and the shooter were tied to the white Mustang. According to Morales, the shooter exited the Mustang. Before the shooting, Morales

had seen appellant standing under a light by the side of the vehicle. Saravia testified that appellant "came out from the area more or less where the [white] car was parked."

Finally, appellant was an occupant of the red Toyota Celica that deputies stopped shortly after the shootings. The firearm used in the shootings was found inside the vehicle's engine compartment. In closing argument to the jury, appellant's counsel stated: "The gun ends up in the red car as well as the person who fired the shots. This we know." "[W]e know that the person who fired those shots didn't leave in the white car. He left in the red car."

Because the shooter was in the red car, the shooter was appellant. He was the only occupant of the vehicle who matched Morales's description of the shooter as well as the description given by Sonia Aguillon to the sheriff and grand jury. He was the only occupant with a shaved head, the only occupant wearing blue pants, and the only occupant with a tattoo on his head. Moreover, gunshot residue was found on both of appellant's hands and the other occupants of the vehicle had no gunshot residue on their hands.

We reject appellant's contention that, but for the admission of Mendez's conditional examination, the jury might have found that Adan Gonzales, another occupant of the Toyota Celica, was the shooter. Gonzales had close-cropped black hair and was wearing a white T-shirt and black pants. He did not have a tattoo on his head. No gunshot residue was found on his hands.

Donaldo Cabrera's testimony does not defeat our conclusion. Donaldo Cabrera testified that he saw a man with a pistol and "a little bit of hair" get inside the Toyota Celica on the right passenger side after the shooting. Cabrera further testified that appellant was not the man with the pistol. However, Cabrera later testified that he did not know whether appellant was the man with the pistol. Furthermore, Cabrera did not get a good look at what was happening. He saw the man with the pistol for "[j]ust a few seconds" while looking through the window of the door to his house. Cabrera

said: "You . . . can see with one eye more or less, but you cannot distinguish." Moreover, Cabrera was not wearing his eyeglasses. In addition, immediately after the shooting, Cabrera told the sheriff that the man with the gun had a "bald, shaved" head. This description matched appellant, not Gonzales. The description is consistent with Cabrera's testimony before the grand jury. While trying to describe the head of the man with the gun, Cabrera had told the grand jury, " '[W]ithout hair it's difficult to guess[.]' "

Appellant was seated on the left passenger side of the Toyota Celica when it was stopped by the sheriff. The identification of appellant as the shooter is not undermined by Cabrera's testimony that the man with the pistol entered the right passenger side of the vehicle. Appellant could have entered on the right and moved to the left passenger seat. Furthermore, before the vehicle was stopped, the occupants may have exited to conceal the firearm inside the engine compartment.[7] Upon reentering the vehicle, they could have taken different seats.

The Trial Court Did Not Err In Admitting Evidence
Of A Prior Murder Committed By Gang Members

Appellant contends that the trial court erroneously admitted evidence that two members of MS had been convicted of murder. The murder occurred on July 1, 1999. The gang members were Ever Rivera and Alex Hzul. The victim was Daniel Vilchis, a member of a different gang. The murder "was over narcotics." The trial court permitted respondent to present evidence that appellant had associated with Rivera and Hzul. It excluded evidence tending to show that appellant had been involved in the murder.

---

[7] Appellant notes that "someone must have put it [the firearm] under the hood after the red car left the scene."

Appellant argues that the admission of the prior murder evidence denied him a fair trial because it should have been excluded under Evidence Code section 352. That section provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The standard of review is abuse of discretion. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 543.) " '[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]' [Citation.]" (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

The trial court did not abuse its discretion. Evidence of the prior murder was properly admitted to prove two allegations in the indictment. One allegation was a criminal street gang enhancement pursuant to section 186.22, subdivision (b)(1). The enhancement alleged that the murder of Cruz and attempted murder of Morales had been "committed for the benefit and at the direction of, and in association with Mara Salvatrucha, a criminal street gang, and with the specific intent to promote, further and assist in criminal conduct by gang members." The other allegation was a special circumstance that appellant had intentionally killed Cruz while appellant "was an active participant in Mara Salvatrucha, a criminal street gang, and that the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).)[8]

To prove these allegations, respondent was required to show that MS was a criminal street gang. To qualify as a criminal street gang, a gang must have "as one of its primary activities" the commission of one or more enumerated criminal acts.

---

[8] The special circumstance allegation became inapplicable when the jury found appellant guilty of second degree murder. Special circumstances apply only when the defendant is convicted of first degree murder. (§ 190.2, subd. (a).)

(§ 186.22, subd. (f).) One of the enumerated acts is "[u]nlawful homicide." (*Id*., subd. (e)(3).) In addition, the gang's members must "engage in or have engaged in a pattern of criminal gang activity." (*Id*., subd. (f).) A " 'pattern of criminal gang activity' " is established by showing that gang members have been convicted of two or more predicate offenses. (*Id*., subd. (e).) "Unlawful homicide" is a predicate offense. (*Id*., subd. (e)(3).)

Thus, evidence of the prior murder had significant probative value. It tended to prove that the commission of unlawful homicide was one of MS's primary activities and that MS gang members had engaged in a "pattern of criminal gang activity." (§ 186.22, subds. (e), (f).) The evidence also tended to prove that appellant had shot Cruz and Morales for the benefit of MS and "to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).)

We reject appellant's contention that the prior murder evidence was "superfluous" because respondent could have proven the criminal street gang allegations by evidence of other offenses committed by gang members. In view of the significant probative value of the prior murder evidence, the trial court did not exceed the bounds of reason in concluding that its probative value was not substantially outweighed by its prejudicial impact. The trial court made an effort to minimize the prejudicial impact by excluding evidence of appellant's involvement in the murder.

Jury Instructions

I

Over appellant's objection, the trial court instructed the jury that appellant could be found guilty of murder if the commission of this offense was the natural and probable consequence of a target offense that he had intentionally aided and abetted. The target offenses were assault and breach of the peace. Appellant contends that the instruction was erroneously given because there is no substantial evidence that he intentionally aided or abetted either target offense.

Respondent argues that any error was invited by appellant because, after the trial court overruled his objection to instructions on aiding and abetting, he submitted his own proposed instructions on this issue that the trial court rejected. Respondent's argument is without merit. " '[T]he doctrine of invited error bars defendant from challenging an instruction given by the trial court when the defendant has made a "conscious and deliberate tactical choice" ' to request the instruction. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 667.) In view of appellant's objection to the instructions given by the court and the rejection of his proposed instructions, the doctrine of invited error is inapplicable.

Accordingly, we consider appellant's contention on its merits. We conclude that substantial evidence supports the trial court's instructions on aiding and abetting. The murder of Cruz occurred during a street fight involving MS gang members. Appellant, a member of MS, was with the group of persons who were fighting. Arresis testified that, earlier in the evening, appellant and another person had fought with Cruz. Appellant had threatened to kill Cruz if he did not " 'get the fuck out of here[.]' " Based on this evidence, the jury could have reasonably inferred that appellant had intentionally aided and abetted the street fight.

In any event, any error in giving the instruction was harmless. The jury rejected an aiding and abetting theory of liabilility. It found true an allegation that appellant had "intentionally and personally discharged a firearm, a handgun, and [had] proximately caused great bodily injury or death to Edgar Cruz" within the meaning of section 12022.53, subdivision (d). The jury, therefore, concluded that appellant was the direct perpetrator of the murder, not merely an aider and abettor.

The jury also found true an inconsistent allegation that appellant "was a principal and at least one other principal intentionally and personally discharged a firearm, a handgun, and proximately caused great bodily injury or death to Edgar

Cruz . . . ." The jury should not have determined the truth of this allegation. The trial court instructed the jury to consider this allegation only if it were unable to "determine whether the [appellant] . . . intentionally and personally discharged a firearm . . . ."

The true finding on the inconsistent allegation does not detract from the finding that appellant personally discharged a firearm and proximately caused Cruz's death. "Inconsistent findings by the jury frequently result from leniency, mercy or confusion. [Citation.] Such inconsistencies in no way invalidate the jury's findings." (*People v. York* (1992) 11 Cal.App.4th 1506, 1510; accord, *People v. Lewis* (2001) 25 Cal.4th 610, 656 ["[a]n inconsistency may show no more than jury lenity, compromise or mistake, none of which undermines the validity of a verdict"]; *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1325.)

II

Appellant contends that the trial court erroneously instructed the jury that it "need not decide unanimously whether [appellant] is guilty as an aider and abettor or as a direct perpetrator." The contention is without merit. "[W]hen 'the two theories, that [the defendant] was the actual perpetrator and that he was an aider and abettor, were based on a single course of conduct,' jury unanimity is not required. [Citation.]" (*People v. Champion* (1995) 9 Cal.4th 879, 931.)

Even if the trial court had committed instructional error, the error would have been harmless because the jury unanimously agreed that appellant was the direct perpetrator of the charged offenses. As to the offenses of murder, attempted murder, and shooting at an inhabited dwelling, the jury found true allegations that appellant had "intentionally and personally discharged a firearm, a handgun, and [had] proximately caused great bodily injury or death" to the victims within the meaning of section 12022.53, subdivision (d). As to the charge of assault with a firearm, the jury found true an allegation that appellant had personally used a firearm within the meaning of section 12022.5, subdivision (a)(1) (now subdivision (a)), and had

personally inflicted great bodily injury upon Andres Morales within the meaning of section 12022.7.

III

CALJIC No. 12.54.1 provides that, to prove the offense of carrying a loaded firearm while being an active participant in a criminal street gang (§ 12031, subd. (a)(2)(C)), the prosecution must show that the defendant "either directly and actively committed, or aided and abetted [a] member[s] of that gang in committing the crime[s] of _____." The trial court gave a modified version of CALJIC No. 12.54.1 that omitted the language "either directly and actively committed." Thus, the instruction given to the jury provided that the prosecution must prove that the defendant "aided and abetted a member or members of that gang in committing the crimes of murder, attempted murder, shooting at an inhabited dwelling and assault with a firearm."

Appellant contends that, since the trial court's underlying instructions on aiding and abetting were erroneous, we must reverse his conviction of carrying a loaded firearm while being an active participant in a criminal street gang. The contention is without merit because, as discussed above, we have rejected appellant's claims of error concerning the aiding and abetting instructions. In any event, any instructional error was harmless because the jury unanimously agreed that appellant was the direct perpetrator of the charged crimes of murder, attempted murder, shooting at an inhabited dwelling, and assault with a firearm. Thus, the jury would have convicted appellant even if it had been instructed that the prosecution must show that he had "directly and actively committed" these crimes.

IV

Appellant argues that the trial court's instructions were understood to allow non-unanimity as to the section 12022.53 findings. The record does not support his argument. The trial court instructed: " 'In order to reach verdicts, all twelve jurors must agree to the decision and to any finding you have been instructed to include in

your verdict.' " We must presume that the jury followed this instruction. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Appellant contends that the prosecutor argued to the jury that it could return a true finding on the section 12022.53, subdivision (d), firearm allegations even if "one juror found that appellant had been an aider and abettor, rather than the shooter." In support of his contention appellant refers us to pages 3369-3370 of the reporter's transcript. In the portion of the argument reported at these pages, the prosecutor said that the jury need not unanimously agree on the theory of liability for murder. The prosecutor never said that unanimity was not required on the section 12022.53, subdivision (d), firearm allegations. In any event, "we presume the jury followed the court's instructions and not the argument of counsel. [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 114.)

The Trial Court Did Not Err In Denying

Appellant's Post-Conviction Motion For Discovery

After appellant was found guilty, he obtained a redacted version of a memorandum, dated May 8, 2000, from the Chief Assistant District Attorney to the Chief Deputy District Attorney. Prior to sentencing, appellant moved to discover the unredacted memorandum. He alleged that the redacted information may discredit the trial testimony of Captain Cheryl Wade. Appellant stated that "the defense theory [was] that Adan Gonzales was the true perpetrator," and that Wade had "manipulated the investigation away from Adan Gonzales, and towards [appellant], in order to support" Arresis's identification of appellant as the shooter. Appellant wanted to review the unredacted memorandum "to be able to properly evaluate whether a motion for a new trial should be made."

The trial court denied the discovery motion. Appellant contends that the ruling was reversible error under the due process clause of the Fourteenth Amendment. He

also contends that the redacted information was discoverable under state law because it was not protected by the attorney's work product privilege.

The redacted memorandum discusses the sheriff's and district attorney's investigations of the shootings of Cruz and Morales. According to the redacted memorandum, it had been initially reported that Carlos Mendez had identified Adan Gonzales as the shooter. Wade, however, insisted that the report was wrong and that Mendez had actually identified appellant. The redacted memorandum notes: "[I]t was over a week after the shooting before [Wade] figured out the identification was incorrect."

Respondent argued that the redacted information was not discoverable because it did not contain material exculpatory evidence. Respondent also argued that the redacted information was privileged work product under Code of Civil Procedure section 2018, subdivision (c), which provides: "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." In addition, respondent claimed that the information was privileged under the "deliberative process privilege" and the official information privilege. (Evid. Code, § 1040.) Respondent requested that the trial court review the unredacted memorandum in camera.

At the hearing on appellant's discovery motion, the trial court stated that it had spent "a number of hours reading Cheryl Wade's testimony a couple times and reading and rereading and rereading and comparing the redacted and unredacted memorandum . . . ." The court concluded that the redacted information was privileged work product under Code of Civil Procedure section 2018, subdivision (c). It did not rule on the other privileges claimed by respondent. In addition, the trial court determined that the redacted information contained "nothing . . . that would further back an impeachment or attack the credibility of Cheryl Wade." The court noted that appellant had done "a pretty good job on cross-examination [of Wade] . . . in terms of some of

the things she was having done and whether or not she was ordering investigators to rewrite different things."

The due process clause of the Fourteenth Amendment requires the prosecution to disclose evidence to a defendant only if it is "both favorable to the defendant and material on either guilt or punishment. [Citation.] [¶] Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.] [¶] Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.] The requisite 'reasonable probability' is a probability sufficient to 'undermine[] confidence in the outcome' on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 543-544 fn. omitted.)

We have reviewed the redacted and unredacted memorandums. Considering the totality of the evidence, the redacted information was not material on the issue of guilt or punishment. It does not undermine our confidence in the outcome of the trial. The denial of appellant's discovery motion did not deny him due process.

Moreover, almost all of the redacted information constitutes privileged work product because its disclosure would reveal deputy district attorneys' "impressions, conclusions, opinions, or legal research or theories . . . ." (Code Civ. Proc., § 2018, subd. (c).) In any event, any error under state discovery laws would not be reversible because the error could not have prejudiced appellant. (See *People v. Clark* (1992) 3 Cal.4th 41, 134; *People v. Memro* (1985) 38 Cal.3d 658, 684.)

Sentencing

I

Appellant contends that, pursuant to section 12022.53, subdivision (e)(2), execution of the sentences on the two 10-year gang enhancements (§ 186.22, subd.

(b)(1)(C)) must be stayed because "there is no unanimous verdict that [he] was the shooter, as opposed to merely being a principal." Section 12022.53, subdivision (e)(2), provides that an enhancement for participation in a criminal street gang "shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

Appellant's contention is without merit. As explained above, the jury unanimously found that appellant had personally discharged a firearm.

II

Appellant claims that the trial court erred in imposing a 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) on the second degree murder conviction. Appellant argues that, pursuant to section 186.22, subdivision (b)(5), the trial court instead should have ordered that he not be paroled until he has served a minimum of 15 calendar years in prison.

We agree. In *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239, this court held that a 10-year gang enhancement does not apply where the underlying offense (second degree murder) carries a life term: "The 15-year minimum parole eligibility period of section 186.22, subdivision (b)(5) applies to all life sentences without qualification, and is imposed in lieu of the determinate enhancement under subdivision (b)(1), not in addition to it. [Citation.] [Fn. omitted.]" Other courts have adopted a similar analysis: "[T]he language of section 186.22 is clear: determinate enhancements are to be imposed only when a determinate term is imposed. The 15-year parole minimum is to be imposed when the defendant has been sentenced to a life term." (*People v. Harper* (2003) 109 Cal.App.4th 520, 527 [10-year gang enhancement stricken and abstract of judgment modified to reflect 15-year minimum

parole eligibility date]; see also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.)[9]

III

Appellant argues that the trial court also erred in imposing a 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) on the attempted murder conviction. Appellant received a determinate sentence of nine years on the underlying offense, but the court imposed an indeterminate term of 25 years to life on the section 12022.53, subdivision (d), firearm enhancement.

People v. Montes (2003) 31 Cal.4th 350, is dispositive of this issue. In *Montes* the defendant was convicted of attempted murder. A gang enhancement allegation (§ 186.22, subd. (b)(1)) and a section 12022.53, subdivision (d), firearm allegation were found true. The Court of Appeal held that the trial court had erred in imposing a 10-year gang enhancement "because the underlying felony of attempted murder and the section 12022.53(d) firearm enhancement *together* resulted in a life term." (*People v. Montes, supra,* 31 Cal.4th at p. 353.) The Court of Appeal struck the gang enhancement and instead imposed the 15-year minimum eligible parole date of section 186.22, subdivision (b)(5).

Our Supreme Court reversed the Court of Appeal's modification of the judgment. It held "that section 186.22(b)(5) applies only where the underlying felony itself provides for a life sentence . . . ." (*People v. Montes, supra,* 31 Cal.4th at p. 353.)

---

[9] This issue is pending before our Supreme Court in *People v. Vo* (2003) 111 Cal.App.4th 321 [review granted November 25, 2003, S119234]; and *People v. Lopez* (Aug. 26, 2003, B161668) [review granted, S119294.)

Accordingly, the trial court did not err in imposing a 10-year gang enhancement on the attempted murder conviction.

Disposition

As to the second degree murder conviction (count I), the 10-year consecutive term imposed pursuant to section 186.22, subdivision (b)(1)(C), is ordered stricken. The judgment is modified to provide that, pursuant to section 186.22, subdivision (b)(5), appellant shall not be eligible for parole until he has served a minimum of 15 calendar years in prison. The superior court shall amend the abstract of judgment to reflect these changes and shall forward a certified copy of the amended abstract of judgment to the Department of Corrections.

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Herbert Curtis, III, Judge

Superior Court County of Ventura

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, Alene M. Games, Deputy Attorney General, for Plaintiff and Respondent.